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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EDDIE P., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE P.,

Defendant and Appellant.

D074294

(Super. Ct. No. J241320)

APPEAL from a Judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed as modified.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

Following a contested adjudication hearing on a wardship proceeding (Welf. & Inst. Code, § 602), the court made a true finding that Eddie P. (the Minor) had committed a robbery (Pen. Code,<sup>1</sup> § 211). The Minor was declared a ward of the court and was committed to Camp Barrett for a period not to exceed 365 days. He was also ordered to comply with various conditions of probation. The Minor did not object to any of the conditions of probation.

The Minor appeals, challenging two of the probation conditions for the first time on appeal. Specifically, he challenges the condition requiring him to submit to searches of his person and property and challenges the condition prohibiting him from using social media. We will find the challenge to the search condition has been forfeited for failure to raise such objection in a timely manner. Even if we consider the objection, we will find the condition valid under the facts of this case.

We find the challenge to the social media condition is a facial constitutional challenge which has not been forfeited. On the merits we find the condition overbroad and order that it be modified.

#### STATEMENT OF FACTS

Since the Minor does not challenge either the admissibility or the sufficiency of the evidence to support the true finding, we will provide only a brief summary of the facts. We will adopt the plaintiff's summary for that purpose.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

The Minor and his coconspirator attended the same high school as the victim. On May 18, 2018, the Minor's coconspirator sent a text message to the victim purporting to set up a marijuana transaction. When the victim arrived at the designated location, the Minor racked the slide of a handgun,<sup>2</sup> pressed the barrel against the victim's head, and told the victim to get on his knees. The Minor said, " 'Get on your fucking knees. Stay on your fucking knees. Don't fucking scream, or I'm going to fucking shoot you.' "

The Minor's coconspirator told the victim that he was being robbed and ordered him to empty his pockets. The victim handed his iPhone, an ounce of marijuana, \$50, and his backpack to the Minor's coconspirator. As the Minor and his coconspirator left, the coconspirator told the victim to " 'have a good day.' " The victim went back to school and reported the incident to the vice-principal, who called the police.

On May 22, 2018, a detective arrested the Minor, read him his *Miranda*<sup>3</sup> rights, and interviewed him. The Minor admitted to the detective that he robbed the victim. The Minor also admitted that he "had posted things on social media," specifically Instagram, but deleted the posts after realizing "that was a mistake."

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<sup>2</sup> The juvenile court dismissed the firearm allegations because it was "not convinced that the evidence proves beyond a reasonable doubt that it was a genuine firearm."

<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

## DISCUSSION

### I

#### The Search Condition

The court imposed the following condition of probation:

"The minor's 4th Amendment waiver extends to any electronic device, such as a computer, electronic notepad, or cell phone, which the minor uses or to which the minor has access. The minor's 4th Amendment waiver also extends to any remote storage of any files or data which the minor knowingly uses or to which the minor has access. The minor agrees to submit to a search of any electronic device, such as a computer, electronic notepad, or cell phone, at any time without a warrant by any law enforcement officer, including a probation officer."

A. The challenge to the search condition was forfeited.

The Minor acknowledges he did not challenge any of the probation conditions in the juvenile court. The Minor argues, however, his challenge here is cognizable because it is a constitutional challenge based upon claims of vagueness and overbreadth. The general rule requires challenges of this sort to be raised in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235; *In re Justin S.* (2001) 93 Cal.App.4th 811, 814; *In re L.O.* (2018) 27 Cal.App.5th 706.) Raising such challenge in the trial court creates a record from which the appellate court can discern the trial court's reasons for the conditions and illuminates the questions of relevance and overbreadth. (*In re R.S.* (2017) 11 Cal.App.5th 239, 247, review granted July 26, 2017, S242387.) Failure to timely object to probation conditions can serve as a basis for applying the forfeiture doctrine to attempts to raise objections for the first time on appeal. (*In re R.S.*, at p. 247; *In re I.V.* (2017) 11 Cal.App.5th 249, 260-261.)

The principal and frequently cited exception to the forfeiture rule is the holding in *In re Sheena K.* (2007) 40 Cal.4th 875, 880-888 (*Sheena K.*). The court in *Sheena K.* held that where the challenge is to the language of the condition based on vagueness or overbreadth, and the challenge can be decided without reference to the facts of the record, failure to timely object does not require forfeiture. (*Id.* at p. 887.) In that case the court forbade the minor from associating with anyone disapproved of by the probation officer. The court determined from the language of the condition that it was vague. It did not contain a knowledge or scienter provision; thus, the minor could err without knowing the probation officer disapproved of her associate. It was not necessary to refer to the factual record in order to address the constitutional question. (*Ibid.*)

In order to address the Minor's challenges here, it is necessary to review the factual record to determine the relationship of the conditions to the Minor's criminal acts and his needs for supervision and rehabilitation. Thus, we find the constitutional challenge to the search condition should be deemed forfeited.

We are also aware our Supreme Court has granted review on the question of the validity of certain electronic search conditions. (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.) We are aware the court has granted review on numerous other cases pending resolution of *In re Ricardo P.* However, pending further direction from the high court we must make our best efforts to resolve the cases presented to us.

B. Even if we review the merits of the constitutional challenge we find no error.

A juvenile court "has wide discretion to select appropriate conditions and may impose ' "any reasonable condition that is 'fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward is enhanced.' " "' (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 889.)

While we do not have the benefit of the trial court's reasons for imposing the various conditions of probation we do have some insight about the Minor based on what is in the record. At the time of the offense the Minor had been using marijuana on a daily basis and was a frequent user of alcohol. The Minor's partner used cell phone texting to lure the victim to the planned robbery. The Minor used a gun, albeit an apparently unloaded one, to commit the robbery and placed the weapon against the victim's head. The Minor then used social media to post material about his participation in the robbery, although he ultimately decided such posting was probably not a good idea and took it down. When police searched the Minor's room they found brass knuckles. It is beyond dispute that the Minor needs strong supervision during his probationary period. The Minor's use of drugs, weapons and alcohol, plus the secreting of brass knuckles in his room demonstrate the Minor cannot yet be allowed the privacy afforded to ordinary citizens if he is going to be prevented from further escalating his criminal behavior.

The Minor's challenge to the search condition focuses primarily on the so-called electronic search portion. He relies heavily on *Riley v. California* (2014) 573 U.S. \_\_\_\_ [134 S.Ct. 2473] (*Riley*) to argue the extensive privacy intrusions that can occur through the search of electronic data storage render the search condition overbroad. *Riley*, of

course, did not deal with probation searches. Rather, it dealt with the issue of whether a person's smart phone could be searched solely on the basis of the search incident to arrest exception to the search warrant requirement. The court found such searches could not be justified solely on the search incident to arrest exception. Hopefully our high court will provide guidance on the application of the privacy discussions in *Riley* to searches of electronics possessed by parolees and probationer.

In *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210, we upheld a similar search condition in the face of a claim it was overbroad. We reached a similar result in *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted November 29, 2017, S244650.

Based on the record before us we find the court was well within its discretion to determine the Minor's need for close supervision, given the crime, its manner of commission and the Minor's secretive possession of weapons, warrants a search condition as broad as in this case in order to attempt to reform this minor before he advances to more serious crime and the adult criminal justice system.

## II

### The Social Media Condition

#### A. Background

The court imposed a probation condition which provided: "The minor shall not knowingly participate in social media sites such as Facebook, Twitter, SnapChat, or Google+, chat rooms, or use instant messaging or other similar communications programs." "The minor shall not have a MySpace page, a Facebook page, or any other

similar page. The minor shall delete any existing page. The minor shall not use MySpace, Facebook, or any similar program." As we are aware, the Minor did not object to these provisions.

B. The objection was not forfeited.

The People contend the Minor forfeited the challenge to the social media condition by failing to raise it in the trial court. While we would have preferred to have the matter discussed first by the trial court, we can determine the condition is overbroad by reference to its plain language and do not need to examine the factual record. The two provisions of the condition create a total and complete ban on the Minor's use of social media. The condition does not even allow the probation officer to make an exception, even though such exception might be beneficial to the Minor's rehabilitation.

The Minor relies heavily on *In re L.O.*, *supra*, 27 Cal.App.5th at page 713, to support his contention the social media condition, as phrased is overbroad. The court in *L.O.* determined a similar condition was overbroad. The court there relied in part on the U.S. Supreme Court opinion in *Packingham v. North Carolina* (2017) 582 U.S. \_\_\_\_ [137 S.Ct. 1730] (*Packingham*). In *Packingham*, the court held the First Amendment prevented the state from barring sex offenders who have served their sentences from all access to social media. In turn, relying on the discussion of social media as a form of free speech, the court in *L.O.* reasoned that barring all access to social media for a juvenile on probation was an overbroad limitation on a constitutional right.

The People argue the *L.O.* case was wrongly decided because of its reliance on *Packingham*, which was factually distinguishable. We find it unnecessary to parse the

court's analysis of *Packingham*. While *Packingham* did not deal with juvenile probationers, it did clarify that in a modern world social media is an important part of free speech and cannot be abridged based merely on status. We think the court in *L.O.* got it right. A complete bar to all access to social media, without any ability for the probation officer to allow such use as would be beneficial, is an overbroad restriction on free speech.

The court in *L.O.* ordered the condition modified by adding to each limitation the phrase "without the express permission of the probation officer."

While the parties disagree on whether the condition is overbroad, they appear to accept the idea of modifying the condition to indicate the Minor cannot use social media without the express permission of the probation officer. We will order the social media condition modified and will affirm the judgment as modified.

## DISPOSITION

The probation conditions relating to access to and use of social media are modified by adding to the end of each prohibition "without the express permission of the probation officer." In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.